

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

1998 Biennial Regulatory Review)

Petition for Section 11 Biennial Review)

filed by SBC Communications, Inc.,)

Southwestern Bell Telephone Company,)

Pacific Bell, and Nevada Bell)

DOCKET FILE COPY ORIGINAL

CC Docket No. 98-177

REPLY COMMENTS OF
HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion"), respectfully submits the following reply comments in the above-captioned proceeding.¹ Hyperion filed initial comments on January 11, 1999.²

In its initial comments, Hyperion urged the Commission to deny the broad regulatory relief requested by SBC. In particular, Hyperion urged the Commission to reject SBC's request to deregulate the incumbent LECs' provision of interstate special access and transport services.³ Hyperion noted that SBC failed to demonstrate that the markets for those services are sufficiently competitive to warrant that relief. Indeed, SBC presented no more than generalized allegations that

¹ 1998 Biennial Regulatory Review -- Petition for Section 11 Biennial Review, Notice of Proposed Rulemaking, CC Docket No. 98-177, FCC 98-238, released November 24, 1998 ("NPRM").

² Comments of Hyperion Telecommunications, Inc., CC Docket No. 98-177, filed January 11, 1999.

³ Hyperion Comments, at 2-3.

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the markets for those services are sufficiently competitive to permit reliance on competition instead of regulation to assure that rates are reasonable. The comments submitted by the other incumbent LECs in support of SBC's Petition fail to bolster SBC's weak arguments.

Other than generalized allegations, SBC's supporters fail to provide further evidence that genuine competition exists in the local exchange market. Like SBC, the other incumbent LECs provide bold assertions, but no evidence to back up their claims. For instance, Bell Atlantic filed comments that support SBC's biennial review proposals, but it failed to provide any further evidence regarding the level of competition in the local exchange market. While Bell Atlantic asserted that more than 88% of Bell Atlantic special access demand has the option of a competitive alternative, it provided no specific evidence regarding the actual presence and ability of competitors to serve customer needs in the Bell Atlantic region.⁴ Similarly, BellSouth merely proclaims without any supporting evidence that "local exchange companies are entrenched in fierce competition in high capacity special access services."⁵ Such statements without any appropriate factual backup require the Commission to conclude that regulation continues to be necessary to ensure that incumbent LECs do not engage in anticompetitive behavior, and that incumbent LEC prices remain reasonable.

Accordingly, the Commission does not have the necessary evidence of competition to grant the broad pricing deregulation suggested by the incumbent LECs.

Indeed, given the current state of competition in the local exchange markets, it would be premature to grant any of the requested relief concerning tariffing or other regulatory areas. As determined recently by the Commission, incumbent LECs continue to possess 97% of the local

⁴ Bell Atlantic Comments, at 5.

⁵ BellSouth Comment, at 2.

service market.⁶ It would not be appropriate to grant the sweeping deregulatory relief sought by incumbent LECs until they have demonstrated some objective measures of compliance with the key market-opening requirements of the Act and that there is some genuine competition existing in their markets.

Hyperion also cautions the Commission to take action to minimize the repeated requests by SBC and other incumbent LECs for forbearance from tariffing and pricing regulation for high capacity services.⁷ The Commission should establish a way of considering these issues that does not entail numerous, repetitive filings. In order to minimize the need for repetitive filings, Hyperion hereby attaches its comments filed recently in response to the separate SBC petition for forbearance from regulation of high capacity services in fourteen markets in its service area.⁸ Those comments demonstrate that SBC has failed to provide any factual basis for forbearance.

⁶ *Local Competition*, Industry Analysis Division, December 1998, at 5.

⁷ See Petition of Bell Atlantic Telephone Companies for Forbearance from Regulation as Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; and Virginia, CC Docket No. 99-24, filed January 20, 1999; *Public Notice*, Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas, CC Docket No. 98-227 (December 8, 1998).

⁸ Comments of Hyperion Telecommunications, Inc. CC Docket No. 98-227, filed January 21, 1999.

For these reasons, Hyperion urges the Commission to deny SBC's request for the regulatory relief it has requested in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Patrick J. Donovan', written over a horizontal line.

Patrick J. Donovan

Pamela S. Arluk.

Swidler Berlin Shereff Friedman, LLP

3000 K Street, N.W., Suite 300

Washington, DC 20007

(202) 424-7500

Dated: January 26, 1999

Counsel for Hyperion
Telecommunications, Inc.

CERTIFICATE OF SERVICE

I, Martina L. Snoddy, hereby certify that on this 26th day of January 1999, copies of Reply Comments of Hyperion Telecommunications, Inc. were delivered by hand and first class mail to the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
12th Street Lobby - TW-A325
Washington, D.C. 20554

Judy Boley
Federal Communications Commission
1919 M Street, N.W. - Room 234
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Timothy Fain
OMB Desk Officer
725 17th Street, N.W.
10236 NEOB
Washington, D.C. 20503

Diskette Only To:

Anthony Dale
Legal Branch Accounting Safeguards Division
Federal Communications Commission
2000 L Street, N.W. - Suite 201 - Room 200D
Washington, D.C. 20554

By First Class Mail To:

Stephen L. Earnest
M. Robert Sutherland
BellSouth Corporation
1155 Peachtree Street, N.E. - Suite 1700
Atlanta, Georgia 30306-3610

Robert J. Aamothe
Todd D. Daubert
Kelley Drye & Warren LLP
1200 19th Street, N.W. - Suite 500
Washington, D.C. 20036

Joseph DiBella
Edward Shakin
1320 North Court House Road - Eighth Floor
Arlington, Virginia 22201

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
United States Telephone Association
1401 H Street, N.W. - Suite 600
Washington, D.C. 20005

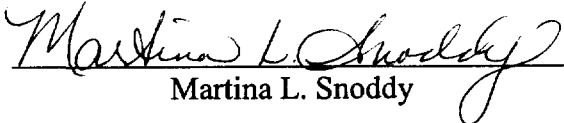
Lawrence Fenster
Senior Economist
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Randolph J. May
Sutherland, Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W. - Suite 701
Washington, D.C. 20006

Mark C. Rosenblum
J. Manning Lee
AT&T Corp.
295 North Maple Avenue - Room 3245H1
Basking Ridge, New Jersey 07920

Barry Pineles
Regulatory Counsel
GST Telecom Inc.
4001 Main Street
Vancouver, Washington 98663


Martina L. Snoddy

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Petition of the SBC Companies for)
Forbearance from Regulation as a Dominant Carrier) CC Dkt 98-227
for High Capacity Dedicated Transport)
Services in Specified MSAs)

COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion"), by its undersigned attorneys, pursuant to the Commission's Public Notice,¹ hereby respectfully submits the following comments on the above-referenced petition filed by the SBC Companies ("SBC"). Hyperion is a leading provider of integrated local telecommunications services over state-of-the-art fiber optic networks in selected markets in the United States. Hyperion operates in 20 geographic markets serving 46 cities, including more than 5,463 route miles of fiber and 17 Lucent 5ESS switches in 11 states. Hyperion has bought or secured an additional 8,100 route miles of fiber optics which it expects to use in 50 new markets in the Eastern United States to operate an advanced regional fiber network.

Hyperion requests that the Commission deny SBC's Petition. First, it would be inappropriate for the Commission to consider SBC's Petition separate from other proceedings already addressing pricing flexibility issues. Thus, in the *Access Charge Reform Proceeding*, the Commission is addressing, among other issues, the appropriate criteria for granting pricing flexibility. SBC's requests are more appropriately considered within the context of that proceeding. Second, even if

¹ *Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas*, CC Docket No. 98-227 (December 8, 1998).

the Commission does consider SBC's Petition, it must deny SBC's forbearance request. SBC has plainly failed to demonstrate that it has met either an appropriate standard for granting pricing flexibility or has met the statutory forbearance standard.

I. The SBC Request Prejudges Pricing Flexibility Issues

The SBC Petition requests that the Commission issue a sweeping forbearance that would relieve SBC from dominant carrier regulation with respect to high capacity dedicated transport services in portions of 14 Metropolitan Statistical Areas ("MSAs"). SBC's Petition, however, involves the very issues the Commission is currently considering in its *Access Charge Reform Proceeding*. Although SBC claims that the docket in the *Access Charge Reform Proceeding* is out of date, just several months ago, the Commission released a public notice requesting parties to update and refresh the record in that docket.² The issues the Commission asked parties to update specifically concerned pricing flexibility. In particular, the Commission requested comments on pricing flexibility proposals submitted by Bell Atlantic and Ameritech, which had requested substantial modifications from the Commission's pricing flexibility proposed guidelines. It would, therefore, be premature for the Commission to rule on the SBC Petition until permanent pricing flexibility criteria are considered in the proceeding where the Commission has sought to establish a record that would enable it to do so.

Moreover, it would be particularly inappropriate to consider SBC's request outside of the *Access Charge Reform Proceeding*, since granting SBC's request would essentially eviscerate the

² *Commission Asks Parties to Update and Refresh Record For Access Charge Reform and Seeks Comment on Proposals For Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256, released October 5, 1998.

phased approach to pricing flexibility envisioned by the Commission. In its *Access Charge Reform NPRM*,³ the Commission proposed a phased approach to pricing flexibility, in which various regulatory requirements will be removed upon the RBOC demonstrating various levels of competition. The Commission set forth particular conditions that would have to be met before the RBOC would be eligible for each stage of increased pricing flexibility.

However, instead of demonstrating the existence of the conditions necessary to qualify for even Phase 1 pricing flexibility, which is the "potential competition" phase, the SBC Petition recommends skipping directly to total pricing flexibility. To be eligible for Phase 1 pricing flexibility, SBC would need to demonstrate that substantial barriers to entry in its market have been removed -- essentially showing that it has complied with many of the requirements of the Section 271 checklist.⁴ SBC has made no such showing. Instead, by proclaiming that vast competition is present in those 14 MSAs, SBC attempts to circumvent the Commission's regulations and move directly to the end stage of pricing flexibility. Because SBC has failed to demonstrate that it is eligible for Phase 1 pricing flexibility, *i.e.* it hasn't even attempted to establish that it has

³ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, 11 FCC Rcd 21354 (1996) ("*Access Charge Reform NPRM*").

⁴ Specifically, the Commission mentioned, among others, the following conditions: (1) unbundled network element prices are based on geographically deaveraged, forward-looking economic costs; (2) transport and termination charges are based on the additional cost of transporting and terminating another carrier's traffic; (3) wholesale prices for retail services are based on reasonably avoidable costs; (4) dialing parity is available; (5) number portability is available; and (6) CLECs have access to ILEC rights-of-way. See *Access Charge Reform NPRM*, at ¶ 163.

significantly removed the barriers to entry into its market, the Commission should deny SBC's request to completely forbear from regulation for high capacity service.

III. SBC Has Not Shown That It Does Not Have Market Power in the 14 MSAs Indicated

Even if the Commission does entertain SBC's requests, it should deny its Petition on factual grounds. Although SBC argues that it is subject to substantial competition in those 14 MSAs listed, it has failed support its allegations with documented evidence.

Although SBC submitted the *Quality Strategies Study*, that Study provides little help in ascertaining the actual market shares in each of the MSAs studied. More specifically, the Study fails to explain how exactly the market share was estimated. For example, if the Study based the percentage of market share on DS-1 equivalents, such an analysis would not provide a reasonable basis for estimating market share. This is because a few DS-3 services provided by various competitors could translate into a large percentage of DS-1 equivalents, even though such competitors may only have a very modest facilities-based presence and may only be serving a few customers in a few locations. Indeed, the *Quality Strategies Study* does not even attempt to make a comparison on other factors which should be considered as part of any indication of the presence of competition, such as shares of high capacity revenues, customers or facilities. Accordingly, the Commission cannot make any rational evaluation of market share based on the *Quality Strategies Study* because the Study fails to provide a complete picture of the status of competition in the various markets.

Moreover, SBC fails to support its assertions regarding demand and supply elasticity. Specifically, SBC argues that because the customers for high capacity transport are large customers, demand must be elastic. However, SBC fails to provide evidence of alternatives that would be

sufficient to constrain LEC prices. Simply by asserting that the customers are sophisticated users does not prove that SBC would not have the ability to charge monopoly based prices, unless there are sufficient alternatives. SBC has failed to clearly demonstrate the presence of such competitive alternatives.

Similarly, SBC's claims with regard to supply elasticity are without merit. SBC argues that there is supply elasticity in the high capacity transport market because competitive carriers have a sufficient amount of fiber to meet demand. However, again, SBC fails to back up its claims with facts. Although competitors may have fiber miles, it does not mean that they have the ability to quickly meet increased customer demand.

Contrary to SBC's claims, it continues to currently possess an unfair advantage in the market by virtue of its size and resources. While it is true that some of the companies SBC refers to are large companies, such as AT&T and MCI WorldCom, virtually all of SBC's competitors are at least partially dependent on some SBC facilities for the provision of local services. Accordingly, SBC enjoys market power by virtue of its size and resources.

Hyperion points out that incumbent LECs, including SBC, continue to dominate the market for local services. Objective measures of competition show that overall incumbent LECs continue to possess nearly 95% of the local service market.⁵ The Commission should not even entertain the

⁵ Collectively, CLECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategies Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997).

idea of the substantial deregulation SBC suggests until competitive LECs have made more than a minor dent in incumbent LECs' overwhelming share of the market.

IV. The Requested Relief is Too Broad

To the extent the Commission entertains SBC's request for deregulation, the Commission must be careful to narrowly tailor any pricing flexibility it grants to SBC. The relief requested by SBC is overly broad and would open the door for it to engage in anticompetitive behavior. Indeed, SBC has failed to provide any assurance that it would not use forbearance as an opportunity to raise prices in markets where there is less competition to make up for rate reductions it makes in response to competition in more competitive areas. Hyperion submits that such a broad grant of pricing freedom would harm competition by providing SBC with the ability to engage in anticompetitive pricing strategies.

V. The SBC Petition Does Not Meet the Standards for Forbearance Under Section 10

Section 10 of the Telecommunications Act requires the Commission to make the following findings prior to forbearance of any regulation: (1) enforcement of such regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable; (2) enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.

SBC has predicated its Petition on bald claims that significant competition exists in the high transport services market. However, as demonstrated above, the market study proffered by SBC is too vague to demonstrate any significant competition in the indicated markets. Without proven competitive restraints, tariffing of high capacity services is necessary to assure that SBC's prices for

those services are just and reasonable. In addition, dominant carrier regulation is necessary to restrict SBC's ability to behave anticompetitively. Accordingly, forbearance is not in the public interest, as regulation continues to be necessary to ensure the reasonableness of prices and to prevent anticompetitive behavior.

IV. CONCLUSION

Hyperion urges the Commission to deny SBC's Petition for forbearance from dominant carrier regulation in the fourteen MSAs specified. At this time, forbearance from regulation in the high capacity dedicated transport service market would be contrary to the public interest. In particular, Hyperion is concerned about unintended, undesirable consequences of premature deregulation. First, premature deregulation could foreclose competition by CLECs by giving SBC the ability to engage in anticompetitive pricing strategies such as by raising prices in markets where there is less competition to make up for price reductions in more competitive areas. Second, premature deregulation could ultimately make telecommunications services unaffordable to consumers as higher interstate access service prices are passed on to consumers. Because other service markets are geared more toward residential consumers instead of businesses and IXC's, the average consumer will have to pay higher costs for allowing SBC increased flexibility in the product area that serves the most lucrative customers. Accordingly, Hyperion urges the Commission to permit competitive forces to fully develop throughout the local exchange market prior to granting SBC and other RBOCs pricing flexibility or forbearance of the type sought in the instant petition.

Respectfully submitted,



Patrick J. Donovan

Pamela S. Arluk

Swidler Berlin Shereff Friedman, LLP

3000 K Street, N.W., Suite 300

Washington, DC 20007

(202) 424-7500

Dated: January 21, 1999

Counsel for Hyperion Telecommunications,
Inc.

CERTIFICATE OF SERVICE


I hereby certify on this 21st day of January, 1999 that a copy of the foregoing Comments of Hyperion Telecommunications, Inc. has been served on each party listed below by hand delivery:

Magalie Roman Salas (original and 4)
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TA-A325
Washington, DC 20554

Jane Jackson
Chief, Competitive Pricing Division
Federal Communications Commission
445 12th Street, S.W., TA-A325
Washington, DC 20554

Richard Lerner
Deputy Chief, Competitive Pricing Division
Federal Communications Commission
445 12th Street, S.W., TA-A325
Washington, DC 20554

International Transcription Service
1231 20th Street, N.W.
Washington, DC 20054


Martina L. Snoddy